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FILED
OCT 13 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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October, 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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ARGUMENT

The 76 page brief of the Carrier contains so many inaccurate statements and irrelevant arguments that a reply brief of at least like size would be necessary to demonstrate all the distortions drawn by it. We believe, however, that most of the errors in the Carrier's brief

are apparent and need no further comment by TCU. This reply brief, therefore, will be devoted only to a discussion of the more salient points of the Carrier's brief.

I. The Carrier's reliance on the Pitney[1] and Slocum[2] cases is unwarranted.

In TCU's petition to this Court for certiorari to review the determination of the Court of Appeals, we showed that neither the *Pitney* nor *Slocum* cases determined the issue in this case, to-wit, whether the Adjustment Board had jurisdiction to determine and was required to determine the rights of employees represented by BRC when the claim before the Adjustment Board merely concerned a dispute between the Carrier and TCU as to whether the Carrier violated its agreement with TCU when it did not assign the performance of certain work to employees represented by TCU.

Our reliance for such assertion was a statement to that effect by this Court in *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366 (1955). Thus, in *Whitehouse*, this Court stated (at 371-372):

> "Assuming the Act permits the Board to consider the claim of one union in light of competing agreements between Railroad and other unions, see *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, does it permit 'final and binding' awards to be rendered interpreting both contracts and resolving the independent claims of both unions in a single proceeding?"

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[1] *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946).

[2] *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950).

We further pointed out that the Court did not answer the question in *Whitehouse,* but that it must be answered here since the Court below held that not only does the Railway Labor Act "permit" the Adjustment Board to make final and binding interpretations of both contracts, but that the Act *requires* the Adjustment Board to do so.

We made this same point in our initial brief in this case (Brief, at 29). Notwithstanding such statement by this Court, the Carrier in its reply to TCU's petition for certiorari (pp. 14-16) and in its brief to this Court (pp. 25-32) continues to argue that the issue herein already has been determined in the *Pitney* and *Slocum* cases without the slightest attempt to explain its assertion in light of this Court's statement to the contrary in *Whitehouse.*

Instead, the Carrier engages in an exhausting analysis of the *Pitney* and *Slocum* cases dredging up such matters as the union's statements in its petition for rehearing in the *Pitney* case, and the union's brief in the *Slocum* case, which, in light of this Court's statement in *Whitehouse,* become entirely irrelevant. We submit that this Court in *Pitney* and *Slocum* was concerned with entirely different issues which do not bear on the issue presented herein. Our contentions on this point are set forth fully in our initial brief, at pages 27-29.

In its discussion of the *Pitney* and *Slocum* cases, the Carrier raises an additional contention which it likewise sets forth at various other places in its brief. The Carrier states (p. 31):

> "The theory now advanced by TCU here would reduce Adjustment Board handling of interunion

> work-assignment disputes to an exercise of futility. Nothing would be resolved-indeed, every time the Adjustment Board decided a work assignment dispute in favor of the claiming union another dispute would be created."

Even assuming that the dispute before the Adjustment Board in this case could be considered an "interunion" dispute, which it was not (see our initial brief, pp. 11-16), and even assuming that the Adjustment Board has jurisdiction to determine "interunion" disputes, which it does not (see our initial brief, pp. 16-26), the Adjustment Board nevertheless would have jurisdiction to proceed in the absence of BRC. This Court held that to be so in *Carey* v. *Westinghouse,* 375 U.S. 261 (1964) wherein the Court stated (at 265):

> "Grievance arbitration is one method of settling disputes over work assignments; and it is commonly used, we are told. To be sure, only one of the two unions involved in the controversy has moved the state courts to compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. Yet the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it. The case in its present posture is analogous to *Whitehouse* v. *Illinois Central R. Co.,* 349 U.S. 366, where a railroad and two unions were disputing a jurisdictional matter, when the National Railroad Adjustment Board served notice on the Railroad and one union of its assumption of jurisdiction. The railroad, not being able to have notice served on the other union, sued in the courts for relief. We adopted a hands-off policy, saying, 'Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it.' Id., at 373."

We thus see that this Court does not agree with the Carrier's position that the absence of a potentially rival union "would reduce the Adjustment Board['s] handling of . . . disputes to an exercise of futility." It should be noted that the Carrier's position (Brief, p. 31) relies upon the dissent in the *Carey* case and conveniently ignores that the majority did not accept the dissenting opinion's arguments.

II. The effect of the Whitehouse[3] and Carey[4] decisions on the issue in this case.

The TCU's contentions with respect to this point are set forth in our initial brief, at pages 27-35.

The Carrier's contention (Brief, p. 33), that this Court's statement in *Whitehouse* that even if notice were given to the Clerks they could be "indifferent to it" and could "refuse to participate", meant only that the Clerks could not be *forced* to participate but did not mean that by refusing to participate they would not forfeit their rights, defies comprehension, and defies any attempt to deal with it.

The Carrier's discussion of the *Carey* case, however, contains a serious misstatement with which we must deal. On page 35 of the Carrier's brief, it states that this Court in *Carey* stated that "if the employer's assignment of work were in accordance with the NLRB decision, 'it would not be liable for damages under § 301 [Id. at 272].' " The Carrier's statement of this Court's holding in *Carey* simply does not accord with the Court's decision.

In *Carey,* the Court recognized that the dispute involved could come within one of two areas. First,

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[3] *Whitehouse* v. *Illinois Central R.R.,* 349 U.S. 366 (1955).

[4] *Carey* v. *Westinghouse,* 375 U.S. 261 (1964).

it could involve a jurisdictional dispute as to which group of competing employees is entitled to the assignment of particular work; second, the dispute could involve a question as to which labor organization represents a particular group of employees. The Court held that in either event arbitration of the dispute should proceed.

The Court divided its discussion of the two possible areas of dispute and discussed the jurisdictional dispute aspect at pages 263-266 of its opinion and discussed the representational dispute aspect at pages 266-272. It is in the course of the Court's discussion of the *representational* aspect of the dispute that the partial quotation appearing in the Carrier's brief appears. The entire sentence reads (375 U.S. 261, at 272):

> "Should the Board [NLRB] disagree with the arbiter, by ruling, for example, *that the employees involved in the controversy are members of one bargaining unit or another,* the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301."

The Court did not say, contrary to the Carrier's brief, that if the employer's *assignment of work* were in accordance with the determination of the NLRB under Section 10(k) that the employer would have no liability in a suit for damages brought under Section 301 of the National Labor Relations Act (NLRA) by a union which had a contractual right to perform such work but to whom such work was not awarded by the NLRB. We have found no cases in which this Court, or any court, has held that such is the law. On the other hand, as we pointed out in our initial brief (at 36-37), this Court

in *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 372, and the Court of Appeals for the District of Columbia Circuit in *Washington Terminal Company* v. *Boswell*, 124 F. 2d 235, 249 (1942), found no inhibition against the possibility of dual liability.[5]

III. TCU's claim did not require the Carrier to take work from employees represented by BRC.

The TCU's contentions on this point are set forth in its initial brief, pages 11-16. The Carrier's position is set forth in its brief at pages 44-49. We will comment only on two of the points raised therein.

First, the Carrier contends (Brief, at 47) that since TCU's complaint to enforce the Award and Order of the Adjustment Board requested the Court to enforce the Award and Order "by writ of mandamus or otherwise" TCU cannot deny that it was seeking the actual

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[5] The Carrier (Brief, at 34) seeks to overcome the effect of this Court's statement in *Whitehouse* that there was no "legal right of the complaining party to be free from such injuries" by stating that the Court was not referring to the possibility of liability to both unions but only to the possibility of "double vexation" because it might be required to devote time and money to what it deemed to be an invalid proceeding. This assertion, however, is not supported by the Court's opinion in the *Whitehouse* case. The Court clearly was referring to the Carrier's contention that it might incur dual liability. Thus, in the paragraph immediately preceding the Court's statement that the carrier would have no legal right to be free of "such" injuries we find (349 U.S. at 371):

> "Again, we have been asked to judge Railroad's present claim to relief on the basis of irreparable injuries which are alleged to flow from the dilemma in which Railroad will find itself confronted either by an invalid award or a situation in which no valid award may be obtained. Railroad asserts that this dilemma is inevitable and *will entail* continuing industrial friction, *the possibility of conflicting awards to both unions,* and accumulating claims to back pay or damages which might have been avoided had notice been given and a valid award been rendered." (Emphasis added.)

assignment of work and not merely money damages, since a writ of mandamus is an inappropriate remedy to enforce a claim for money damages. Such contention is unsound. The only reason for TCU's use of the language "by writ of mandamus or otherwise" is that Section 3, First, (p) of the Act (45 U.S.C. § 153, First, (p)) uses such phraseology. The last sentence of that Section provides:

> "The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

In *Marbury* v. *Madison,* 1 Cranch 137, 2 L. Ed. 60 (1803), the Court referred to Blackstone for the definition of a writ of mandamus. The Court stated (2 L. Ed. at 64):

> "Blackstone, vol. 3, p. 110, says that a writ of mandamus is 'a command issuing in the king's name from the court of king's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice. *It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have anything done, and has no other specific means of compelling its performance.*'" (Emphasis added.)

All that Section 3, First, (p) did was to make statutory the common law remedy of mandamus, and all that the Congress intended is that a district court, in the enforcement of an award and order of the Adjust-

ment Board, shall have the power to direct a carrier to carry out the decision of that administrative tribunal. Such mandate may be applied with equal facility to a determination by the Adjustment Board requiring the payment of money as to a determination requiring the performance of some other task.

The Carrier next argues (Brief, p. 48) that there is no distinction between the dispute in this case and a jurisdictional dispute because if the District Court had enforced the Adjustment Board's Award and Order for the payment of money damages, the Carrier would have replaced its clerks with telegraphers to avoid paying two salaries, and thus employees represented by BRC are involved in the dispute. Such argument is fallacious.

The fact that the Carrier may pursue a particular course of action as a result of an adverse judgment, in attempting to mitigate the impact of the judgment, does not ipso facto determine that employees who might be affected by such course of action are parties to the dispute. The critical question is whether the Carrier's action in taking the work from the clerks would be required by the judgment. If the question is answered in the negative, as it must be in the present case, any action taken by the Carrier will be subject to relief if unlawful. Thus, if the Carrier should discharge clerks, and if such action would be violative of the BRC agreement, it would be subject to corrective action in a claim brought by BRC in a proceeding before the Adjustment Board. Such possibility obviously does not make BRC a party to the claim by TCU.

IV. There is no "national labor policy" expressed in the Railway Labor Act against overlapping contracts.

The Carrier argues (Brief, pp. 49-54) that there is a "national labor policy" against a carrier entering into overlapping contracts assigning the work to groups of employees in different crafts or classes and that when such agreements have been made the "national labor policy" requires the Adjustment Board to extricate the Carrier from its predicament by ascertaining which group of employees is entitled to perform the work with no liability to accrue to the Carrier in having entered into separate agreements assigning the same work to different groups of employees.

The so-called "national labor policy" referred to by the Carrier is that found in Section 10(k) of the National Labor Relations Act (29 U.S.C. § 160) (NLRA) which provides that when two groups of competing employees claim the same work, and one of the competing groups strike to obtain the work, the NLRB shall hear the dispute and determine which group of competing employees should perform the work. There is no similar provision under the Railway Labor Act, however. Furthermore, even under Section 10(k), we know of no case in which a court has held that if the employer had *contracted* to assign the work to two different unions, that the union, to which the work was not assigned pursuant to a determination by the NLRB under Section 10(k), would not have a cause of action for breach of such agreement. Certainly such suit would not in any way interfere with the "national labor policy" as expressed in Section 10(k) of the NLRA against strikes over work assignments. The public policy has been completely satisfied by the Section 10(k) proceeding which ended

the strike and permitted the disputed work to be continued. We can imagine no public policy which would be served by allowing an employer to violate contractual obligations with impunity.

There is no counterpart of Section 10(k) of NLRA in the Railway Labor Act. And even if there were, it would not come into operation in the situation we have here, for it comes into operation only when there is a strike over a work assignment. Such situation does not arise under the Railway Labor Act. That Act provides for arbitration of "minor disputes", for the arbitration of disputes over the interpretation or application of agreements, and provides for no other resolution of disputes over work assignments.

V. The Railway Labor Act does not provide the Adjustment Board with jurisdiction to determine jurisdictional disputes between groups of employees.

The contentions of TCU on this point are set forth in its intial brief, at pages 16-26.

In our initial brief (pp. 19-20) we showed that the composition of the Adjustment Board into four independent divisions, each with plenary power over disputes involving employees within its respective division is additional indication that Congress did not intend the Adjustment Board to have jurisdiction to determine inter-union disputes, referring to situations which arise when employees in one division claim that their agreement covers work which the Carrier assigned to employees in another division. We concluded that in such situations, there is nothing in the Railway Labor Act to prevent each of the groups of employees from filing claims before their respective divisions of the Adjustment Board and from receiving sustaining

awards. The Carrier (Brief, at 55) refers to our argument as a "hypothetical situation" notwithstanding the fact that our brief (p. 20, footnote 1) cites five cases in which precisely such a situation has occurred. Many more examples could have been provided.

Significantly, the Carrier concedes (Brief, pp. 61-62) that the Adjustment Board does *not* "in the first instance have jurisdiction to consider a work assignment dispute which was framed as being entirely between two unions." Of course, it can not do otherwise in face of the precise language of Section 3, First, (i) of the Railway Labor Act (45 U.S.C. § 153, First, (i)) which limits the jurisdiction of the Adjustment Board to disputes "between an employee or group of employees and a carrier or carriers."

The Carrier argues (Brief, at 62), however, that since TCU framed the claim before the Adjustment Board as a dispute between itself and the Carrier, the Adjustment Board thereby acquired jurisdiction to determine "the basic reality" of the claim which was "that it actually involved an attempt by TCU to exert jurisdiction over work assigned to employees represented by BRC."

We thus would have the unique situation in which, according to the Carrier, an administrative agency must assert jurisdiction over a dispute, which it does not have jurisdiction to determine, simply because of an erroneous submission of the dispute to the tribunal as a dispute over which it does have jurisdiction. Once the Adjustment Board asserts jurisdiction to determine what it mistakenly believed to be a dispute between a union and an employer, it somehow, through some mystery, would have its jurisdiction enlarged to

encompass whatever the dispute actually involves. The Carrier cites no authority for this novel theory, nor can it claim logic for its forbear.

VI. BRC was not an indispensable party to TCU's action to enforce Adjustment Board Award No. 9988.

The issue of whether the BRC was an indispensable party to the TCU's enforcement action is viewed by the Carrier (Brief, pp. 65-76) as an issue separate and apart from the issue of whether the Adjustment Board had jurisdiction to determine *and was required to determine* the right of employees represented by BRC in the proceeding initiated by TCU.

It is apparent that whether BRC was an indispensable party to the enforcement action, of necessity, will depend upon the resolution of the primary issue of whether BRC was an indispensable party to the proceedings before the Adjustment Board. TCU contends that BRC was not an indispensable party before the Adjustment Board since TCU's claim merely concerned the rights of employees represented by TCU under its agreement with the Carrier. The Adjustment Board's determination that the Carrier violated its agreement with TCU in no way did, or could, affect the rights of employees represented by BRC which rights, if any, stem from another collective bargaining agreement which was not a subject of a dispute before the Adjustment Board or anywhere else.

If TCU's position is sound, it follows that TCU's action to enforce the Award and Order of the Adjustment Board likewise could have no affect on the rights of employees represented by BRC. The portion of this Court's decision in *Shields* v. *Barrow*, 21 U.S. 409, 411

(1854), cited by the Carrier, to-wit, that a person is indispensable only, if he has

> "an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience,"

clearly is inapplicable to BRC since BRC has no interest in the final decree that determines merely the rights of other employees, not represented by BRC, under a collective bargaining agreement to which BRC was not a party, and concerning which it has stated that it has no interest. (R. 76-77)

The Carrier further asserts (Brief, at 73) that one of the issues upon which BRC might wish to comment in the enforcement action is that purportedly raised by TCU, namely:

> "TCU has intimated that BRC, by failing to participate in the Adjustment Board proceedings, in effect waived any interest it may have had to the work involved."

The Carrier fails, as it fails so often to do in its brief, to cite any reference for its assertion and in fact such assertion is not founded on fact.

Finally, the Carrier contends (Brief, at 74-76) that BRC was an indispensable party to TCU's action to enforce the Award and Order of the Adjustment Board "to protect Union Pacific in its compliance with any decree or judgment."

Underlying this argument of the Carrier is its apparent belief that it has what is tantamount to an inherent right to be relieved from any possibility of dual

liability to different groups of employees in situations in which it may have contracted to provide each group of employees with the right to perform the same work. We know of no basis for such right. The Adjustment Board was created for the primary purpose of adjudicating claims between employees and carriers arising from their collective bargaining agreements. It is entirely consistent with such purpose that a carrier may find itself in a position in which it has made itself contractually bound under two separate agreements to assign the same work to different groups of employees and liable for damages for breach of the agreement to the group to whom the work is not assigned.

Respectfully submitted,

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